Sincere Leasing Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–01–8 OF 1998

SHAIK DAUD, SITI NORMA YAAKOB AND DENIS ONG JJCA

22 FEBRUARY 2000

Revenue Law *— Income tax — Appeal against assessment — Method to apportion common expenses on fixed assets attributable to leasing and non-leasing business — No findings of fact made; whether passing statement of accounting method used sufficient — Application to remit case stated to Special Commissioners to be redrafted to comply with direction of Federal Court in E v Comptroller General of Inland Revenue — Notice of motion to rectify omission in preparation of case stated; whether court should consider effects of omission*

Before the Special Commissioners, the appellant had appealed against the 1986–1988 assessments raised by the respondent and at the hearing, the main issue for determination was whether the method adopted by the respondent in the apportionment of common expenses on fixed assets attributable to the appellant's leasing and non-leasing business was correct. The Special Commissioners accepted the method adopted by the respondent to be correctly made and in line with the provisions of the Income Tax Act 1967 ('the Act'). They accordingly dismissed the appellant's appeal and confirmed the respondent's assessment. The appellant filed a notice requiring the Special Commissioners to state a case for the opinion of the High Court. That was done but before the High Court could hear the matter on its merits, the appellant filed a notice of motion pursuant to para 40 of Schedule 5 to the Act seeking an order to have the case stated remitted to the Special Commissioners to be redrafted to comply with the direction of the Federal Court in *E v Comptroller General of Inland Revenue* [1970] 2 MLJ 117. The other reason given by the appellant why the case should be sent back was that it was incomplete as the Special Commissioners had failed to make a finding of fact as to what was the accounting method adopted by the appellant and what was the accounting method in the leasing industry. The notice of motion was intended to rectify the omissions in the preparation and submission of the case stated. However, it was rejected by the High Court on the ground that there was no justification for such a remission as all the omissions complained of were apparent on the face of the case stated. The appellant appealed.

Held:

(1) It was not right and proper for the High Court to offer an explanation for the omission. The question to be asked was whether there had been compliance or non-compliance with the practice direction. Once the court was satisfied that there had

been non-compliance, it should have ordered remission straight away and not consider the effects of the omission (see p 158E).

(2) The Special Commissioners made no specific finding of fact as to the accounting method used by the appellant nor the one used in the leasing industry, although they had in passing made references to them. But references alone was not sufficient. There must be primary findings of fact made in the accounting systems adopted by the appellant and the one currently in use in the industry (see p 159D–E).

(3) For the omissions that had been complained of, the court considered that it was only right and proper that such omissions be rectified. Although the right to refuse or order a remission is very much an exercise of a discretion by the court below, in the circumstances of this appeal, the court considered that the discretion had not been exercised judicially. On that basis, the court allowed the appeal and directed that the case stated be remitted to the Special Commissioners (see p 160A-B).

[Bahasa Malaysia summary

Di hadapan Pesuruhjaya-Pesuruhjaya Khas, perayu telah merayu terhadap penaksiran-penaksiran 1986–1988 yang dibuat oleh responden dan semasa perbicaraan, isu utama untuk penentuan adalah sama ada cara yang diterima-pakai oleh responden di dalam pembahagian perbelanjaan bersama ke atas aset-aset tetap yang berpunca daripada perniagaan pajakan dan bukan pajakan adalah betul. Pesuruhjaya-Pesuruhjaya Khas telah menerima cara yang diterima-pakai oleh responden sebagai telah dibuat dengan betul dan selaras dengan peruntukan-peruntukan Akta Cukai Pendapatan 1967 ('Akta tersebut'). Mereka telah menolak rayuan perayu dan mengesahkan penaksiran responden. Perayu telah memfailkan notis memerlukan Pesuruhjaya-Pesuruhjaya Khas untuk menyatakan kes bagi penentuan Mahkamah Tinggi. Itu telah dibuat tetapi sebelum Mahkamah Tinggi boleh mendengar perkara tersebut di atas merit, perayu telah memfailkan notis usul menurut perenggan 40 Jadual 5 Akta tersebut memohon untuk suatu perintah agar kes dihantar semula kepada Pesuruhjaya-Pesuruhjaya Khas untuk diderafkan semula untuk mematuhi arahan Mahkamah Persekutuan di dalam *E v Comptroller General of Inland Revenue* [1970] 2 MLJ 117. Alasan lain yang diberikan oleh perayu mengapa kes tersebut patut dihantar semula adalah bahawa ia adalah tidak lengkap kerana Pesuruhjaya-Pesuruhjaya Khas telah gagal untuk membuat penemuan fakta apa cara perakaunan yang diterima-pakai oleh perayu dan apakah cara perakaunan di dalam industri pajakan. Notis usul adalah bertujuan untuk membetulkan ketinggalan-ketinggalan di dalam penyediaan dan hujahan kes yang dinyatakan. Namun, ia telah ditolak oleh Mahkamah Tinggi di atas dasar bahawa tiada justifikasi untuk

pengembalian semula kerana semua ketinggalan-ketinggalan yang diadukan adalah jelas di atas permukaan kes yang dinyatakan. Perayu telah merayu.

Diputuskan:

(1) Adalah tidak betul dan wajar bagi Mahkamah Tinggi untuk menawarkan penjelasan bagi ketinggalan tersebut. Persoalan yang perlu ditanya adalah sama ada terdapat pematuhan atau ketidakpatuhan dengan arahan amalan. Selepas mahkamah berpuashati bahawa terdapat ketidakpatuhan, ia patut menghantarnya untuk didengar semula dengan terus dan bukan mempertimbangkan kesan-kesan ketinggalan-ketinggalan tersebut (lihat ms 158E).

(2) Pesuruhjaya-Pesuruhjaya Khas tidak membuat penemuan fakta yang spesifik berkenaan dengan cara perakaunan yang digunakan oleh perayu atau yang digunakan oleh seseorang di dalam industri pajakan, walaupun mereka di dalam membuat kelulusan telah membuat rujukan kepadanya. Tetapi rujukan semata-mata adalah tidak mencukupi. Mestilah terdapat penemuan fakta asas di dalam sistem perakaunan yang diterima pakai oleh perayu dan dengan sistem yang sedang digunakan di dalam industri tersebut (lihat ms 159D–E).

(3) Bagi ketinggalan-ketinggalan yang diadukan, mahkamah telah berpendapat bahawa ia adalah betul dan wajar bagi ketinggalan sedemikian dibetulkan. Walaupun hak untuk menolak atau mengarahkan ia didengar semula adalah sangat berkaitan dengan pelaksanaan budi bicara mahkamah perbicaraan, di dalam keadaan-keadaan rayuan ini, mahkamah berpendapat bahawa budi bicara tersebut tidak dilaksanakan secara kehakiman. Di atas dasar tersebut, mahkamah membenarkan rayuan tersebut dan mengarahkan kes tersebut dihantar semula kepada Pesuruhjaya-Pesuruhjaya Khas (lihat ms 160A–B).]

Notes

For cases on appeal against assessment, see 10 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1724–1725.

Cases referred to

Chua Lip Kong v Director-General of Inland Revenue [1982] 1 MLJ 235 (refd)

Consolidated Goldfields plc v Inland Revenue Commissioners [1990] 2 All ER 398 (refd)

E v Comptroller-General of Inland Revenue [1970] 2 MLJ 117 (refd)

Legislation referred to

Income Tax Act 1967 s 33(1), para 34, para 40 of Schedule 5
Income Tax Leasing Regulations 1986 reg 2

Appeal from: Tax Appeal No R3–14–5 of 1997 (High Court, Kuala Lumpur)

Cyrus Das (*Arjunan Subramaniam* and *John Matthew* with him) (*Shook Lin & Bok*) for the appellant.

Abu Tariq Jamaluddin (Senior Federal Counsel, Inland Revenue Board) for the respondent.

Siti Norma Yaakob JCA (delivering judgment of the court): This income tax appeal is not about the liability of a taxpayer but is more concerned with the procedure to be followed when the Special Commissioners of Income Tax ('the Special Commissioners') decide to transmit a case to the High Court by way of a case stated under para 34 of Schedule 5 to the Income Tax Act 1967 ('the Act').

Before the Special Commissioners, the appellant had appealed against the 1986–1988 assessments raised by the respondent and at the hearing, the main issue for determination was whether, the method adopted by the respondent in the apportionment of common expenses on fixed assets attributable to the appellant's leasing and non-leasing business, was correct.

Tax is calculated on the adjusted income of a taxpayer. To ascertain the adjusted income, all outgoings and expenses incurred wholly and exclusively in the production of the gross income will have to be deducted from the gross income. See s 33(1) of the Act. However by virtue of reg 2 of the Income Tax Leasing Regulations 1986, income from leasing and non-leasing activities are to be treated separately and distinct from each other and as such the common expenses of one business cannot be set off against the other. It is a simple matter where the expenses are identifiable as being attributable to one or the other activity. Problems do arise when the expenses are common to both activities and in such situations, the common expenses are apportioned between the two activities before they can be deducted from the gross income in order to arrive at the adjusted income. It was the method of apportionment that was the issue before the Special Commissioners with the appellant contending that the respondent's method was wrong and erroneous whilst theirs was right and proper.

The Act does not make any provision as to the method of apportionment but all parties agree that the formula to be used is

$$\frac{\text{Income of leasing activities}}{\text{Income of leasing activities} + \text{Income of non-leasing activities}} \times \text{Common expenses}$$

But that is as far as the agreement goes as the appellant contend that for the income of their leasing activities only interest can be taken into account and this is in line with the accounting practice where only the interest element of leasing and non-leasing activities is considered as income. The

respondent on the other hand maintains that the income of the leasing activities is made up of the gross income ie principal and interest and clearly the crux of the dispute relates to the composition of the income in the leasing business.

The Special Commissioners accepted the method adopted by the respondent to be correctly made and in line with the provisions of the Act. They accordingly dismissed the appellant's appeal and confirmed the respondent's assessments for the years 1986–1988.

It was to appeal against that deciding order that a notice was filed by the appellant requiring the Special Commissioners to state a case for the opinion of the High Court. That was done but before the High Court could hear the matter on its merits, the appellant filed a notice of motion pursuant to para 40 of Schedule 5 to the Act, seeking an order to have the case stated remitted to the Special Commissioners:

(1) to be redrafted to comply with the direction of the Federal Court in *E v Comptroller-General of Inland Revenue* [1970] 2 MLJ 117 (*E*'s case) or

(2) alternatively, to state a supplementary case to contain

(i) the contentions made by the parties,

(ii) the evidence as led by the parties and

(iii) the findings of the Special Commissioners on the evidence so led.

Clearly the notice of motion was intended to rectify the omissions in the preparation and submission of the case stated. However it was rejected by the High Court on the ground that there was no justification for such a remission as all the omissions complained of are apparent on the face of the case stated. It was to appeal against the dismissal of the notice of motion that the parties were before us.

The first objection taken by the appellant was that the time-honoured practice as directed by the Federal Court in *E*'s case had not been followed by the Special Commissioners. That practice which had been in force since 1976 lays down the procedure and practice as to how a case stated is to be submitted to the High Court. The direction to adopt that practice became necessary as Schedule 5 to the Act which is titled 'Appeals' makes no provision as to the proper procedure to be followed. In so doing, the Federal Court at p 120 of the report had this to say:

> ... this court should give some indication as to the practice which should be followed in the future. It is clear that the law relating to such appeals is similar to the law in England in relation to similar appeals as contained in s 64 of the Income Tax Act 1952 and the earlier Acts. Reference to the practice followed in England is made in the following passage in the judgment of Collins MR in *Manchester Corp v Sugden* [1903] 2 KB 171:
>
> > 'There can be no doubt whatever that, under the modern practice at all events (and it seems to me to be a very convenient practice), the parties interested in the case are allowed or invited to see the case in its proposed form, and are then allowed or invited to make suggestions and amendments upon it. It seems to me that it is very desirable that this

> should be done, because cases of this kind are usually complicated and often involve large sums of money; and if a case when stated does not come in the final form to a hearing on the real points which the parties desire to try, the only alternative is that the court has to send it back again, and that involve a good deal of expense.'
>
> I believe it is well within the province of this court to direct that that practice should to be followed, and I would make a direction accordingly. It is an admirable practice and, if followed, there will seldom arise the necessity for a court to order the case to be remitted to the commissioners in order to put right the case stated.

In the instant appeal, the practice of forwarding a draft of the proposed case stated to the appellant and the respondent for their comments and settling it before submitting it to the High Court was not done by the Special Commissioners and the justification for this omission is expressed by the High Court in the following manner.

> In this case, the gist of the practice direction had been complied with in that the contents of the case stated were set out inaccordance with the approved practice. Thus, mere failure to send the case stated to the parties for their comments before forwarding it to the High Court, to my mind, was not fatal, and such failure would not render the case stated defective and the proceeding before the High Court Invalid. Whatever defects in the case stated, if there is any, could always be cured by the High Court by virtue of its power under para 40 of Schedule 5 of the Act.

We do not consider that it was right and proper for the High Court to offer an explanation for the omission. The question to be asked was whether there had been compliance or non-compliance with the practice direction. Once the court was satisfied that there had been non-compliance, it should have ordered remission straightaway and not consider the effects of the omission. To do so is to question the wisdom of the Federal Court to set the precedent and that we say is not the function of the High Court. It must be remembered that the practice direction was not issued by an official as part of his administrative duties, but that it formed part of a judgment by the highest judicial tribunal in the country. As such, the Federal Court had given all due considerations to the practice of having a proposed case commented and approved by the parties before the final settlement for submission to the High Court so that all matters in dispute are clearly and precisely stated for determination and incidence of remission after that, will not be made necessary. It was to prevent the case being shuttled to and fro and minimise the incidence of delay that the Federal Court decided to adopt the practice direction and to say that such an omission can be cured under para 40 to Schedule 5 of the Act, is to do the very thing that the practice direction seeks to prevent.

The other reason given by the appellant why the case should be sent back was that it is incomplete as the Special Commissioners had failed to make a finding of fact as to what was the accounting method adopted by the appellant and what was the accounting method in the leasing industry.

The omission complained of, brings to mind what should appear in the case stated. That same question was asked and answered by the Privy

A Council in *Chua Lip Kong v Director-General of Inland Revenue* [1982] 1 MLJ 235 at p 236 in the following manner:

> Their Lordships cannot stress too strongly how important it is that, in every case atated for the opinion of the High Court, the Special Commissioners should state clearly and explicitly what are the findings of fact upon which their decision is based and not the evidence upon which those findings, so far as they consist of primary facts, are founded. Findings of primary facts by the Special Commissioners are unassailable. They can be neither overruled nor supplemented by the High Court itself; occasionally they may be insufficient to enable the High Court to decide the question of law sought to be raised by the case stated, but in that event it will be necessary for the case to be remitted to the Commissioners themselves for further findings. It is the primary facts so found by the Commissioners that they should set out in the case stated as having been 'admitted or proved'.

B

C

It must be remembered that in apportioning the common expenses for their leasing and non-leasing activities, the appellant had included only interest as part of their income in line with the accounting practice in the leasing industry where only the interest element is considered.

D

Under para 6 of the case stated, the Special Commissioners had, at sub-para (a) set out all the facts admitted and at sub-para (b) all the facts proved. But there is no specific finding of fact as to the accounting method used by the appellant nor the one used in the leasing industry, although they had in passing made references to them. But reference alone is not sufficient. There must be primary findings of fact made in the accounting systems adopted by the appellant and the one currently in use in the industry. Findings of fact are very important in a case stated as the notes of evidence taken by the Special Commissioners are never submitted to the High Court. It is for this reason that there is a need to make a finding on the matter of the accounting systems relied upon by the appellant and currently in use in the leasing industry and to clearly state so, to enable the High Court to ascertain the real question of law sought to be raised. Guidelines on this matter were enunciated in the case of *Consolidated Goldfields plc v Inland Revenue Commissioners* [1990] 2 All ER 398 at p 402 it was held as follows:

E

F

G

(1) The findings of fact are for the commissioners. They cannot be instructed to find facts, nor as to the manner in which they express their findings.

(2) The parties are entitled to expect that the commissioners will In the case stated make findings covering the matters which are relevant to the arguments adduced or intended to be adduced on appeal.

(3) If a request is made for a case stated to be remitted for additional findings to be made or to be considered, the applicant must, in my opinion, show that the desired findings are: (a) material to some tenable argument; (b) at least resonably open on the evidence that has been adduced; and (c) not inconsistent with the finding or findings that have already been made.

H

In this instance, the accounting systems are matters of relevance as they are intended to be argued before the High Court. The Special Commissioners had preferred the respondent's apportionment which as alleged by the appellant runs contrary to the prescribed and established accounting

I

method. This makes it all the more desirable that the Special Commissioners state their findings of fact so as to enable the High Court to identify the real question of law sought to be determined.

For the omissions that have been complained of, we consider that it is only right and proper that such omissions be rectified. Although we are mindful that the right to refuse or order a remission is very much an exercise of a discretion by the court below, in the circumstances of his appeal, we consider that the discretion had not been exercised judicially. On that basis and for reasons appearing in this judgment we had allowed this appeal with costs here and below and directed that the case stated be remitted to the Special Commissioners to enable them:

(1) to make a primary finding of fact as to the accounting method as adopted by the appellant,

(2) to make a primary finding of fact on the accounting system as prescribed and practised in the leasing industry and

(3) to adhere to the practice direction as set out in *E*'s case.

We also ordered the deposit to be refunded to the appellant.

Order accordingly.

Reported by Jafisah Jaafar